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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Group:	1617
Confirmation No.:	1013
Application No.:	09/870,899
Invention:	**Animal Food and Method**
Applicant:	Wilson, et al.
Filed:	May 31, 2001
Attorney Docket:	834460-68474
Examiner:	S. Jiang

Certificate Under 37 CFR 1.8(a)

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on January 31, 2005

Rebecca Ball
(Signature)

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REPLY BRIEF UNDER 37 C.F.R. § 1.193(b)

Mail Stop Appeal Brief
Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

Sir:

An Examiner's Answer was mailed on November 30, 2004 in the above-captioned application. Appellants hereby submit a Reply Brief under 37 C.F.R. § 1.193(b), in response to the Examiner's Answer. Appellants do not believe that any fees are required with this Reply Brief. If any fees are required, the Commissioner is hereby authorized to charge any fees or credit any overpayment to Appellants' undersigned counsel's deposit account 10-0435 with reference to our matter 834460-68474.

ARGUMENTS

On page 2 of the Examiner's Answer, the Examiner states that "[t]he rejection of claims 1-6, 8-9, 13-20, 23, 25, 41, and 71-102 stand or fall together because appellant's brief does not include a statement that this grouping of claims does not stand or fall together and reasons in support thereof." On page 6 of Appellants' Appeal Brief, Appellants state under the heading "GROUPING OF THE CLAIMS" that "[c]laims 1-6, 8-9, 13-20, 23, 25, 41, and 71-102 are all separately patentable at least for the reasons stated in the following ARGUMENTS." The reasons that the claims are separately patentable are discussed in the "ARGUMENTS" section of Appellants' Appeal Brief. Accordingly, contrary to the Examiner's statement, the claims do not stand or fall together.

In the Examiner's Answer, the Examiner indicates that the rejections are reiterated from "the prior office action mailed on November 19, 2003." See pages 4 and 7 of the Examiner's Answer. Appellants are not aware of an office action mailed on November 19, 2003 in the above-captioned application. Appellants assume that the Examiner is referring to the final office action mailed on February 26, 2004 because, in the Examiner's Answer, the Examiner has reiterated the rejections made in the February 26, 2004 office action, and has made additional arguments and cited new case law. Appellants will respond in this Reply Brief only to new case law citations and to new arguments not made by the Examiner in the February 26, 2004 final office action.

In the Examiner's Answer, the Examiner indicates (pages 15-16 and 19) that Appellants do not provide unexpected results to overcome the Examiner's assertions of *prima facie* obviousness. In Appellants' Appeal Brief, Appellants have discussed in detail why the Examiner has not established *prima facie* obviousness of Appellants' claims and Appellants are not required to present secondary considerations to rebut the Examiner's arguments where

the Examiner has not established *prima facie* obviousness of Appellants' claims. However, Appellants have submitted a commercial success declaration evidencing the commercial success of Appellants' claimed invention (see pages 24-28 of Appellants' Appeal Brief).

On page 13 of the Examiner's Answer, the Examiner cites *Merck & Co. v. Biocraft Laboratories*, 10 USPQ2d 1843 (Fed. Cir.), *cert. denied*, 493 U.S. 975 (1989), as concluding that "[a] reference may be relied upon for all that it would have reasonably suggested to one having ordinary skill the art, including nonpreferred embodiments." As stated on page 9 of Appellants' Appeal Brief, Fristche et al. teaches only that when a source of omega-3 fatty acids (*i.e.*, menhaden fish oil) is fed to the sow, the level of omega-3 fatty acids is increased in the sow's serum and milk and that, as a result, the level of omega-3 fatty acids is increased in the serum of the suckling pigs. Fritsche et al. does not teach, suggest, or even mention that reproductive performance is increased in sows fed a diet supplemented with omega-3 fatty acids. Accordingly, Fritsche et al. does not teach "nonpreferred embodiments" that would render Appellants' claims obvious.

In fact, Fritsche et al. teaches away from the invention of claims 1-6, 8-9, 13-20, 23, 25, 41, and 71-102. In the section of Fritsche et al. titled "Litter Size, Birth Weights, and Weaning Weights," the effects of feeding the LA, MIX, and FO diets described in Fritsche et al. on litter size, birth weights of pigs, and weaning weights of pigs are described. Fritsche et al. teaches that administering to pregnant sows a feed composition supplemented with 3.5% or 7% by weight of menhaden fish oil **does not** increase the number of live pigs born per litter, **does not** increase birth weights, and **does not** increase weaning weights. Accordingly, Fritsche et al. clearly teaches away from the invention of claims 1-6, 8-9, 13-20, 23, 25, 41, and 71-102 and does not teach any embodiments, preferred or nonpreferred, that would render Appellants' claims obvious.

On pages 14 to 15 of the Examiner's Answer, the Examiner cites *Riverwood Int'l Corp. v. R.A. Jones & Co.*, 66 USPQ2d 1331 (Fed. Cir. 2003) as concluding that "[a] statement by an applicant during prosecution identifying the work of another as prior art is an admission that that work is available as prior art against the claims, regardless of whether the admitted prior art would otherwise qualify as prior art under the statutory categories of 35 U.S.C. 102." The issue regarding the Examiner's arguments that Appellants have made admissions on page 2 of Appellants' specification is not whether the journal articles and patents cited on page 2 of Appellants' specification are prior art. The issue is whether or not it is proper for the Examiner to badly misquote Appellants and to attempt to use misstatements as admissions against the Appellants when the Appellants have made no such admissions. Clearly, this is improper. Appellants did not make the statements alleged by the Examiner and if Appellants' statements are fairly evaluated, rather than misconstrued, Appellants' statements in combination with the references cited by the Examiner do not render claims 1-6, 8-9, 13-20, 23, 25, 41, and 71-102 obvious.

On page 19, lines 6-11 of the Examiner's Answer, the Examiner states that "Appellants assert that the cite [sic] prior art teaches the effects of the instant fatty acids on the reproductive performance of ruminants; swine are not rumination [sic]. However, Abayasekare [sic] et al. teaches that species such as human, cow, pig, rat, are known to have dietary intake of the fatty acids herein (see page 279, the left column) and "Effects of altering dietary fatty acids on Female reproduction" broadly and in general (see page 279-281)."

The Examiner's statements are misplaced. As discussed on pages 19-21 of Appellants' Appeal Brief, Abayasekara et al. teaches that the unsaturated fatty acids normally present in the diet of non-ruminants (*e.g.*, swine) appear in the tissues of the non-ruminants so there is no reason to supplement the diet of non-ruminants with unsaturated fatty acids. Thus, Abayasekara et al. teaches away from Appellants' claimed invention. Furthermore,

Abayasekara et al. provides no teaching that "C_{20} and C_{22} omega-3 fatty acids" as specified in claims 1-6, 8-9, 13-20, 23, 25, 41, and 71-102 have any effect on reproductive performance.

A statement that pigs normally have fatty acids in their diets, as most animals do, in combination with the heading "Effects of Altering Dietary Fatty Acids on Female Reproduction," where non-ruminants are not even mentioned in the section with that heading, does not render obvious a method where the diet of non-ruminants (*i.e.*, female swine) is supplemented with a marine animal product containing unsaturated "C_{20} and C_{22} omega-3 fatty acids" as specified in claims 1-6, 8-9, 13-20, 23, 25, 41, and 71-102. See also the arguments on pages 19-23 of Appellants' Appeal Brief.

CONCLUSION

Appellants submit that the Examiner's rejections of claims 1-6, 8-9, 13-20, 23, 25, 41, and 71-102 under 35 U.S.C. §103(a) are clearly erroneous. Appellants urge that the Board reverse the Examiner's 35 U.S.C. §103(a) rejections. Such action is respectfully requested.

Respectfully submitted,

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